BEFORE THE

ILLINOIS COMMERCE COMMISSION

In the Matter of	)	
	)	
Petition for Arbitration of XO ILLINOIS,	)	
INC. Of an Amendment to an	)	Docket No. 04-0371
Interconnection Agreement with SBC	)	
ILLINOIS, INC. Pursuant to Section 252b)	)	
of the Communications Act of 1934, as	)	
Amended	)	

Attachment 1 to SBC Illinois' Initial Brief

(Summaries of SBC Illinois' Positions)

ISSUE XO-1: Routine Network Modifications

SBC ILLINOIS POSITION

Issue XO-1 involves several discrete disputes:

First, the 1996 Act, the FCC's rules, and the *TRO* are clear that SBC Illinois is entitled to recover its costs of performing routine network modifications. XO proposes to deny SBC Illinois cost recovery on the theory that SBC Illinois should (or already does) recover these costs in its recurring rates, but XO has proposed no mechanism to adjust SBC Illinois's recurring rates to account for such costs, nor has it even attempted to demonstrate that such costs are somehow already recovered in SBC Illinois' current UNE loop prices. The Commission should thus reject XO's proposal, and adopt SBC Illinois' proposal that pricing for such modifications should be determined on an individual case basis. (Section 3.16.1.) SBC Illinois acknowledges its duty to avoid double recovery of costs, but this can be dealt with through the ICB pricing process rather than attempting, in this proceeding, to determine whether and to what extent a large variety or work may or may not be included in current unbundled loop prices. This is consistent with the approach of the FCC's Wireline Competition Bureau in the *Cavalier* arbitration.

Second, the Commission should reject XO's proposal in Section 3.16.1 to require SBC Illinois to construct new loops under the pretext of a "routine network modification." Constructing new facilities is not a "modification" of existing facilities at all. Moreover, in the *TRO* the FCC held *without qualification* that ILECs are not required to "build[] a loop from scratch by trenching or pulling cable," and are not "required to trench or place new cables for a requesting carrier." *TRO*, ¶¶ 636, 639. XO's proposed contract language runs afoul of these directives.

Third, the Commission should also reject XO's proposal in Section 3.16.2 to add several specific vague items, not listed by the FCC, as examples of routine network modifications. Those items do not appear in the *TRO*, and XO has provided no evidence that the listed activities in fact constitute routine network modifications under the FCC's rule. SBC Illinois' proposed language, by contrast, accurately tracks the FCC's language and clear intent, and should be adopted.

Fourth, XO's proposal in Section 3.16.3 to require SBC Illinois to "provide light continuity and functional signal carriage across both ends of a dark fiber" is unsupported by the *TRO*. Dark fiber is just that – dark. The FCC concluded that CLECs must activate dark fiber themselves using "self-provided optronic equipment," and that "carriers that request dark fiber transport . . . must purchase and deploy necessary electronics." *TRO*, ¶¶ 381-82. XO cannot sneak in the back door, under the guise of a "routine network modification," precisely what the FCC prohibited. Moreover, the FCC's routine network modification rule provides that, with respect to dark fiber, such modifications include activities to "enable a requesting telecommunications carrier to light a dark fiber." Rule 319(e)(5). In other words, again the FCC confirmed that it is the CLEC that must do the "lighting."

Fifth, the provisioning of network elements that require routine network modifications should not be made subject to the standard provisioning intervals used for UNEs that do not

require such modifications. (XO Section 3.16.4.) There is no reason to alter SBC Illinois' existing performance measures that govern network element modification. Performing routine network modification activities manifestly increases the time reasonably necessary to provision a network element. It would be against all reason to subject routine network modifications to the same provisioning intervals that were created to measure the provisioning of network elements that do not require such modifications. Moreover, the FCC directed states to "address the impact of these modifications as part of their recurring reviews of incumbent LEC performance." *TRO*, ¶ 639. If XO believes that performance measures should be used to measure the provisioning of network elements that require routine network modifications, it can raise that issue at the appropriate time (for example, in the 6-month performance measure and remedy plan review that the Commission has already established as part of the Section 271 Plan, in which all CLECs may participate).

ISSUE XO-2: Commingling

SBC ILLINOIS POSITION

First, XO's proposed language to require the commingling of "section 271 network elements" should be rejected. In its *Errata* to the *TRO*, the FCC expressly deleted the *single* reference to section 271 network elements that it originally made in its commingling discussion (in ¶ 584), indicating that that reference was in error. As a result, nowhere in that discussion does the FCC include section 271 network elements in the list of wholesale services that CLECs may commingle with UNEs. To the contrary, the FCC refers only to tariffed access services and section 251(c)(4) resale services. *TRO*, ¶¶ 579-84. Thus, the Commission should reject XO's attempt to include section 271 network elements in the parties' commingling contract language, and instead direct the parties to incorporate SBC Illinois' proposed language. (Section 3.14.1.)

Second, the Commission should adopt SBC Illinois' proposal to include the so-called "*Verizon* restrictions" in the parties' commingling contract language. (Section 3.14.1) Even if *Verizon* addressed only combinations, that does not mean XO should be allowed to demand commingling where doing so would, for instance, threaten the security or reliability of the network or discriminatorily impede the ability of other CLECs to access UNEs or interconnect.

Third, the Commission should approve the use of the bona fide request ("BFR") process for submitting commingling requests. (Sections 3.14.1.3 and 3.14.1.3.1.) That process, which is well-defined and has a long history, has previously been approved for use in situations for ordering undefined or unidentified arrangements, and there is no need to depart from the process here. Moreover, SBC Illinois has made a commitment to develop processes to eliminate the need for BFRs, as commingled arrangements are identified and defined.

Fourth, XO's suggestion that SBC Illinois should be required to perform commingling functions free of charge must be rejected. *See* Section 3.14.1.3.2. In the *TRO*, the FCC simply did not address the nonrecurring charges for performing the activities necessary to establish commingling arrangements. But that silence cannot be interpreted to mean that SBC Illinois cannot impose cost-based charges to recover the costs it incurs in performing such functions, any more than the FCC's failure to expressly address, for instance, the monthly charges for mass market loops means that all loops are now free. Nor can that silence be interpreted as an attempt

to overrule the pricing requirements of the 1996 Act (something the FCC could not lawfully do in any event) or the FCC's TELRIC rules, which allow incumbents to recover the costs they incur in providing network elements to competitors.

ISSUE XO-3: Combinations [omitted]

ISSUE XO-4: Conversions

SBC ILLINOIS POSITION

A "conversion" is the process of changing the provision of a wholesale service to the provision of the equivalent UNE (or combination of UNEs). In *USTA II* the D.C. Circuit disagreed with the FCC's "decision to allow 'conversions' of wholesale special access purchases to UNEs." *USTA II*, 359 F.3d at 593. The D.C. Circuit agreed with the ILECs that those rules were "too lax," because "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . precludes a finding that the CLECs are 'impaired' by a lack of access to the element." *Id.* at 592-93. While XO suggests the Commission should ignore *USTA II*, the Commission cannot, consistent with the arbitration provisions of the 1996 Act or the federal Constitution, ignore binding federal law. Thus, the Commission should adopt SBC Illinois' proposed contract language regarding *USTA II* (Section 3.15.1), which provides that upon the issuance of the mandate in *USTA II*, SBC Illinois is not required to perform conversions unless "lawful and effective FCC rules or orders require conversion."

The Commission should also approve SBC Illinois' proposed language to govern conversions in the event "lawful and effective FCC rules or orders require conversion," and reject XO's competing language. First, XO's proposal to prohibit SBC Illinois from assessing *any* charges in connection with conversions is clearly inconsistent with the *TRO*. In the *TRO*, the FCC identified only particular "wasteful and unnecessary charges" that should not be assessed. *See TRO*, ¶ 587. It did not prohibit all charges, as XO proposes. (Section 3.15.3.)

Moreover, nonrecurring charges to cover the costs that SBC Illinois actually incurs to process a conversion request are neither "wasteful" nor "unnecessary." To the contrary, they are required by the 1996 Act and the FCC's pricing rules. XO does not deny that SBC Illinois actually performs activities and incurs costs to process an XO order for a conversion, such as service ordering and billing change functions and costs. Pursuant to the 1996 Act and the FCC's TELRIC pricing rules, SBC Illinois is entitled to recover these costs from XO. Furthermore, the Commission recently approved cost-based non-recurring project administration charges applicable to conversions of special access services and resale private line circuits to UNEs. Order, Docket No. 02-0864, at 214-15 (June 9, 2004).

Similarly, the FCC held that CLECs cannot "supersede or dissolve existing contractual arrangements through a conversion request." *TRO*, ¶ 587. Thus, to the extent that XO seeks to do just that through a conversion request, it is appropriate (and required by the *TRO*) that SBC Illinois assess any applicable early termination or similar charges, as SBC Illinois' proposed language provides. Moreover, the FCC expressly refused to grant CLECs a "fresh look" with respect to special access to UNE conversions, holding that doing so "would neither be in the

public interest nor represent a competitively neutral approach." *Id.* ¶ 696. Thus, SBC Illinois' proposed Section 3.15.10 should be adopted to implement these FCC requirements. Moreover, the Commission should reject XO's proposed section 3.15.7, which would require SBC Illinois to convert a special access service within 30 days, with no minimum period termination liability, where SBC Illinois denies a request for a UNE (*e.g.*, for a lack of facilities). That proposed language finds no support in the *TRO*, and is contrary to the FCC's holdings regarding the applicability of early termination charges.

The Commission should also approve SBC Illinois' proposed language regarding the ordering processes for conversions. (Sections 3.15.4, 3.15.5, 3.15.6.) Where SBC Illinois has not developed processes for conversion orders, it should follow the change management guidelines. The change management process has previously been examined and approved by this Commission (and the FCC), and there is no reason to depart from that process. While XO would like to dictate new ordering processes via a two-party arbitration, the development of new processes is more appropriately handled through a process that allows for the input of all CLECs, as the change management process does. Moreover, the contract should require XO to "follow the guidelines and ordering requirements" in place for the particular service to be converted, as SBC Illinois proposes.

Finally, the Commission should approve SBC Illinois' proposed language regarding eligibility criteria. (Sections 3.15.2 and 3.15.8.) In the *TRO*, the FCC held that a CLEC must "meet[] the eligibility criteria that may be applicable" to convert services, and held that "the serving incumbent LEC may convert the UNE or UNE combination to the equivalent wholesale services in accordance with the procedures established between the parties" in the event the CLEC "fails to meet the eligibility criteria for serving a particular customer." *TRO*, ¶ 586. XO does not propose any language to implement these requirements. SBC Illinois' proposed language, on the other hand, appropriately implements these requirements.

ISSUE XO-5: Qualifying Service

SBC ILLINOIS POSITION

In the *TRO*, the FCC promulgated "qualifying service" rules, intended to ensure that CLECs requesting UNEs use those UNEs to provide services in competition with traditional ILEC services, and not, for instance, solely to provide long distance. The D.C. Circuit concluded that "the prevention of 'gaming' by CLECs seeking to offer services for which they are not impaired" is a "legitimate" goal. 359 F.3d at 592. Thus, the parties should include qualifying service language in their contract.

SBC Illinois' proposed language most accurately reflects the qualifying service restrictions, and should be adopted. SBC Illinois' proposal that a carrier cannot access UNEs unless it is a "telecommunications carrier" providing "telecommunications services" (Section 1.2) is required by the 1996 Act, which contains those very limitations. 47 U.S.C. § 251(d)(2). Thus, this language is appropriate regardless of the state of the FCC's qualifying service rules.

The Commission should also adopt SBC Illinois' proposed language providing that to access UNEs, XO must "provide" at least one "qualifying service" (that is, a service offered in

competition with the telecommunications services traditionally the exclusive or primary domain of SBC Illinois, like local voice service) on a common carrier basis. (Sections 1.2, 2.22.2.) XO should not be allowed to access UNEs to provide solely "non-qualifying services," like long distance service. Section 251(d)(2) of the 1996 Act provides for unbundled access where the lack of access would impair the ability of the entrant "to provide the services it seeks to offer," and it has never been shown (and SBC Illinois does not believe could ever be shown) that CLECs are "impaired" in offering solely non-qualifying services like long distance service without access to UNEs.

XO's proposed language, which would not require XO to actually provide any qualifying service, but only to "offer" a qualifying service, and even then only on a private carriage basis, would impermissibly allow XO to "game" any qualifying service restriction. For instance, XO could satisfy its proposed requirement by "offering" local service to select customers on a private carriage basis for ten times the prevailing prices, knowing full well that that offer would never be accepted, and then proceed to access UNEs to provide solely non-qualifying services. The Commission should also conclude, as did the FCC, that XO must offer qualifying services on a common carrier basis, to "ensure[] that the benefits of competition accrue to the general public." *TRO*, ¶ 151.

Further, SBC Illinois' proposed language regarding certification of compliance with qualifying service restrictions is reasonable and should be adopted. (Sections 1.2.3, 1.2.4, 1.2.4.1.) SBC Illinois' language provides that the CLECs' use of UNEs constitutes a representation that it complies with the qualifying service requirements, and requires the CLEC to provide written certification only upon request. Finally, the Commission should adopt SBC Illinois' proposed definition of "local." (Sections 2.22.1 and 2.22.3.) The term is significant in the context of the qualifying service provisions of the parties' contract, and should not be left undefined as XO proposes.

ISSUE XO-6: What eligibility and certification requirements should apply for access to high-capacity EELs pursuant to FCC rules?

SBC ILLINOIS POSITION

In the *TRO*, the FCC promulgated specific eligibility criteria to govern access to EELs, designed to ensure that CLEC use EELs to provide local service, and imposed upon CLECs certain obligations to certify their compliance with those criteria. The D.C. Circuit affirmed the EEL eligibility criteria, finding them to be "reasonable" and "satisfactorily explained." 359 F.3d at 592-93.

The FCC's rules requiring the unbundling of dedicated transport and high-capacity loops have been vacated, and the FCC's rules require the provision of combinations (including EELs) only of network elements that the FCC has found should be unbundled under Section 251. However, to the extent that the FCC were to require SBC Illinois in the future to provide unbundled high-capacity loops and dedicated transport (and thus EELs), the FCC's EEL rules would apply, and thus it is reasonable to reflect the FCC's EEL eligibility and certification rules in the parties' contract, although those rules (and corresponding contract language) would come into play only if the FCC adopts new rules that require EEL unbundling.

Thus, SBC Illinois' proposed contract language should be adopted. SBC Illinois' proposed language appropriately tracks and implements the FCC's EEL eligibility rules, while XO's proposed language does not. For instance, SBC Illinois' proposed definition of an EEL tracks the FCC's definition, while XO's proposed definition includes "entrance facilities" – which the FCC expressly held are *not* UNEs. (Section 2.13.) *See TRO*, ¶¶ 365, 368, n.1116. Similarly, the *TRO* (¶ 604) holds that an EEL must terminate in a collocation arrangement; SBC Illinois' proposed language incorporates this requirement, while XO's inexplicably does not.

The parties also dispute the appropriate language governing certification with the eligibility criteria. XO should be required to use a standard certification form, as SBC Illinois proposes, to increase efficiency and lower the costs of processing such forms. Sections 3.14.3.2 and 3.14.3.3. It would be inappropriate to allow XO to certify compliance via any undefined "method of its choosing," as XO proposes.

XO also opposes contract language proposed by SBC Illinois that provides commercial certainty regarding the types of documentation that XO must preserve in accordance with the requirements of the *TRO*. Section 3.14.3.6.2. But it is commercially reasonable to specify the records that must be maintained, rather than leave it open for future disputes, and SBC Illinois' proposed language should be adopted.

Further, XO would deny an auditor's finding of non-compliance with the EEL eligibility criteria any effect, but would instead require that an audit be "confirmed" by the Commission or the FCC. (Section 3.14.3.2.) That proposal is directly contrary to the *TRO*, which provides that "*[t]o the extent the independent auditor's report concludes that the competitive LEC failed to comply with the service eligibility criteria*, that carrier must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, and make the correct payments on a going-forward basis." *TRO*, ¶ 627 (emphasis added). Giving the auditor's report such effect is especially reasonable in light of the fact that an auditor must be *independent* and mutually agreed upon by *both* parties. Moreover, XO is not barred from seeking further review if it believes an auditor's report is in error. Pursuant to the *TRO*, however, SBC Illinois cannot be required in every instance to bear the burden to seek further review and "confirmation" from the Commission or the FCC if the auditor concludes XO has not complied with the EEL eligibility requirements.

The parties also have several disputes regarding the precise language to implement the FCC's detailed eligibility criteria. XO's proposed language violates those criteria, and must be rejected. SBC Illinois' proposed language, on the other hand, is directly supported by FCC's actual rule and the *TRO*, and should be adopted. For instance, SBC Illinois proposes (and XO opposes) language in Sections 3.14.3.3, 3.14.3.3.2, 3.14.3.3, 3.14.3.4, 3.14.3.5, 3.14.3.3.4.1, 3.14.3.3.4.2, and 3.14.3.3.5 that parallels the FCC's rule and its discussion in the *TRO* near or literally *verbatim*.

Finally, XO opposes SBC Illinois' proposed language providing that the failure of SBC Illinois to enforce the eligibility criteria does not constitute a waiver of its right to subsequently enforce those criteria. Section 3.14.4. XO has not explained its objection to this commercially reasonable language, and this language should be adopted.

ISSUE XO-7: Audits

SBC ILLINOIS POSITION

SBC Illinois' language best reflects and implements its "right to audit compliance with the qualifying service eligibility criteria" (*TRO*, ¶ 626), while XO's proposed language would impermissibly restrict that right.

The FCC held that "incumbent LECs may obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." *TRO*, ¶ 626. XO's proposal to limit such audits (and resulting remedies) to instances where SBC Illinois identifies specific circuits with respect to which it asserts specific eligibility criteria are not satisfied is unreasonable and inappropriate, and should be rejected. *See* XO Sections 3.14.3.8.1 - .2 and 3.14.3.8.5 - .6. The *TRO* contains no such limitation on the ILEC's audit rights. And such a limitation would not make any sense. The FCC created the audit right precisely because ILECs do not possess the data required to determine whether a CLEC is in compliance with the eligibility criteria – that data is possessed by the CLEC. *See TRO*, ¶ 626 (audits are appropriate to satisfy "the incumbent LECs' need for usage information").

Moreover, the FCC already created the safeguards necessary to balance the ILECs' right to demand an audit to determine compliance against the risk of illegitimate audits. In particular, the FCC limited the right to require an audit to an annual basis, requires the ILEC to pay for the audit, and requires the ILEC to reimburse the CLEC's costs if the auditor concludes the CLEC was in compliance.

With respect to auditing standards, SBC Illinois proposes (and XO opposes) tracking the FCC's language precisely. (Section 3.14.3.8.3.) In paragraph 626 of the *TRO*, the FCC provided specific guidance on the auditor's duties, and these requirements should be reflected in the parties' contract. XO's suggestion that incorporating the FCC's specific requirements "would burden the agreement with unnecessary detail" should be rejected. There is nothing "unnecessary" about the FCC's requirements.

The parties also disagree regarding proposed language governing true-up payments and the application of TELRIC-based rates where it is determined that XO was not in compliance with the eligibility criteria. (Section 3.14.3.8.5) While the *TRO* calls for true-up payments in such an event (¶ 627), it does not specify when such payments begin. The parties' contract should fill in this detail, as SBC Illinois' proposed language does. Moreover, TELRIC-based rates do not apply for any period where XO is not in compliance with the eligibility criteria, because for such periods XO is not entitled to UNEs at TELRIC-based rates. Indeed, that is the entire point of the eligibility criteria, and XO's objection to this language is unfathomable.

With respect to the conversion of noncompliant circuits (*e.g.*, the conversion of an EEL to special access where XO does not satisfy the EEL eligibility criteria), SBC Illinois' proposed language provides that it may "initiate and affect such a conversion on its own." (Section 3.14.3.8.5.) XO's contrary language would allow XO to delay compliance with the eligibility requirements until such time as XO chooses to submit a conversion request to convert noncompliant circuits. That is an unreasonable proposal. SBC Illinois' language, on the other

hand, treats noncompliant EELs and other noncompliant conversions in an identical manner, and with respect to conversions in general the FCC held that "[t]o the extent a competitive LEC fails to meet the eligibility criteria for serving a particular customers, *the serving incumbent LEC may convert the UNE or UNE combination to the equivalent wholesale service*." *TRO*, ¶ 586 (emphasis added).

Finally, SBC Illinois' cost-shifting language should be adopted, and XO's rejected. (Section 3.14.3.8.6.) The FCC held that the burden to bear auditing costs depends on whether or not the auditor concludes that the CLEC has substantially complied with the eligibility criteria. If the CLEC was in substantial compliance, then the ILEC must bear auditing costs. If the CLEC was not in substantial compliance, then the CLEC must bear the costs. *TRO*, ¶¶ 627-28. SBC Illinois' language properly reflects the FCC's holding. XO's proposed "pro-rata" cost apportionment, on the other hand, is contrary to the FCC's requirements, and must be rejected.

ISSUE SBC-1:

(a) Under what circumstances may SBC Illinois discontinue offering a network element that no longer is required to be unbundled?

(b) Under the TRO, may either party change the change of law language?

SBC ILLINOIS POSITION

Issue SBC-1 concerns whether the interconnection agreement should obligate SBC Illinois to continue to provide network elements that are no longer required to be unbundled (*i.e.*, that have been "declassified") at the same rates, terms, and conditions that would apply if the network elements were required to be unbundled. SBC Illinois' proposed language appropriately reflects the scope of SBC Illinois' obligation to provide UNEs, stating that SBC Illinois is required to provide as UNEs only those network elements that are actually, and lawfully, UNEs. XO's proposed language, on the other hand, would have the inappropriate and unlawful effect of requiring SBC Illinois to provide, as UNEs, network elements that are not actually, lawfully UNEs.

The contract language SBC Illinois proposes provides that SBC Illinois is required to provide only "Lawful UNEs," defined as "UNEs that SBC Illinois is required to provide pursuant to Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders or lawful and effective orders and rules of the [ICC] that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [1996 Act] or the FCC's regulations to implement the [1996 Act]." Network elements that do not satisfy this standard, but were previously provided as UNEs, are considered "declassified." This language appropriately reflects SBC Illinois' obligations to provide UNEs under the *TRO* and the 1996 Act.

While section 251(c)(3) of the Act requires ILECs to "unbundle" certain network elements, Congress did not specify the particular network elements that must be unbundled.

Rather, it directed the FCC to determine which network elements must be unbundled by applying the "impairment" test of section 251(d)(2). Moreover, as the D.C. Circuit made clear in *USTA II*, it is the *FCC* that must determine which network elements satisfy the "impairment" requirement of section 251(d)(2), and thus must be offered as UNEs pursuant to section 2512(c)(3). *USTA II*, 359 F.3d at 561. In short, "the UNEs that SBC Illinois is required to provide pursuant to Section 251(c)(3) of the Act" are limited to those "determined by lawful and effective FCC rules and associated lawful and effective FCC . . . orders," precisely as SBC Illinois' proposed contract language provides.

SBC Illinois' proposed contract language also provides that "lawful UNEs" include those network elements that SBC Illinois is required to unbundle pursuant to "lawful and effective orders and rules of the [ICC] that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [1996 Act] or the FCC's regulations to implement the [1996 Act]." Again, such language is required by the *TRO* and the 1996 Act. In the *TRO*, the FCC held that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations." *TRO*, ¶ 187. Rather, the FCC held, such actions must be "consistent with the Act" and with "the [FCC's] section 251 implementing regulations" (*TRO*, ¶ 193 & n.614), which is precisely what SBC Illinois' proposed language provides. This language is also directly supported by section 261(c) of the Act ("additional state requirements"), which states: "Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are *necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with* [sections 251-261 of the Act] *or the [FCC's] regulations to implement* [those sections]." 47 U.S.C. § 261(c) (emphasis added).

SBC Illinois' proposed language appropriately implements the *TRO*. XO's objection that the language might have the effect in some circumstances of creating new "change in law"-like procedures, to the extent it would apply to future UNE declassifications, is without merit. XO also proposes contract language to govern future UNE declassifications in some situations, as well as additions to the list of UNEs, instead of relegating all such events to the parties' existing change of law process. Thus, XO's assertion that SBC Illinois' language must be rejected simply because it has the same effect as XO's proposed language must be rejected.

Moreover, the *TRO* unequivocally "declassified" certain network elements, including OCn loops, OCn dedicated transport, and enterprise switching, holding that these facilities are no longer UNEs. These new rules were either not challenged on appeal, or were not disturbed on appeal. SBC Illinois' proposed contract language appropriately implements the *TRO* by classifying these facilities as "declassified" rather than "lawful UNEs," thus making clear SBC Illinois is no longer required to provide these elements as UNEs under the parties' contract.

Finally, XO's attempt to add section 271 checklist items to the parties' contract as items SBC Illinois must provide as section 251 UNEs must be rejected. Pursuant to the *TRO*, determination of the rates, terms, and conditions for section 271 checklist items is a matter for the FCC under sections 201 and 202 of the 1934 Communications Act. And even if this Commission did have jurisdiction to address the issue, XO's proposal must be rejected because the FCC unequivocally held that section 251 rates, terms, and conditions do *not* apply to section

271 checklist items, and the D.C. Circuit unequivocally approved that determination. *TRO*, ¶¶ 655-59; *USTA II*, 359 F.3d at 589.

ISSUE SBC-2:

(a) What is the appropriate transition and notification process for UNEs that no longer have to be unbundled?

(b) Under the TRO, may either party change the change of law language?

SBC ILLINOIS POSITION

In order to properly implement the *TRO*, the parties' contract must be amended to provide a clear, orderly, and definite process for the transition of network elements that are no longer UNEs. XO's proposed language does not provide for any real transition plan at all to implement the *TRO*'s declassifications, and thus does not appropriately implement the requirements of the *TRO*. (*See* XO Section 3.13.1.1.) In particular, XO's proposed language would allow for a transition only if the parties were able to agree on a "transition schedule." In the event the parties could not agree on a transition schedule, the Commission would have to step in.

If that sounds familiar, it is because that is precisely where we are today. The parties were unable to agree on a transition schedule, and thus the Commission has been forced to step in to arbitrate the matter. XO's proposal to delay the creation of any transition schedule for many more months, pending more negotiation and after the Commission is forced to step in again, is unreasonable.

It is also contrary to the FCC's direction in the *TRO*. The FCC stated that, if the parties could not agree on "transition timing," state commissions should "conclude their consideration of such disputes within nine months of the effective date of this Order." *TRO*, ¶ 703. Under XO's proposal, however, the Commission's "consideration" of the transition timing dispute has not even begun. Thus, XO's proposed language, and SBC Illinois' should be adopted.

SBC Illinois' proposed transition plan language provides for a final, concrete, and well-defined transition period for those facilities that XO is no longer entitled to access as UNEs. That language appropriately defined "declassified" facilities and expressly identified network elements declassified by the *TRO* and *USTA II* (Sections 1.3, 1.3.1, 1.3.1.1, 2.20), and specifies that such facilities are subject to the transition procedures of the contract (Sections 1.3.1.3, 1.3.2, and 1.3.3). The transition procedures provide for written notice of a declassification, followed by a 30-day transition period where the CLEC can issue disconnect orders or agree upon an alternative arrangement (*e.g.*, resale or special access). (Section 1.3.4.) If the parties cannot agree, SBC Illinois may convert the facilities to resale or special access. (Section 1.3.4.)

XO's assertion that SBC Illinois' language would somehow inappropriately modify the parties' change in law language rather than implement the *TRO* should be rejected. As an initial matter, XO's proposed language too applies to certain future "declassifications," and to that

extent would appear to supplement the parties' existing change of law process. XO cannot object merely because SBC Illinois' language might have the same effect.

In any event, SBC Illinois' proposed language appropriately implements the *TRO*'s new impairment standard and the *TRO*'s new approach to unbundling. Under this new regime, network elements are subject to frequent "de-listing," and may be de-listed at different times and in different places. XO's suggestion that each such future declassification should be followed by another round of negotiations, and likely another proceeding before this Commission, is unreasonable and inappropriate.

ISSUE SBC-3: Loops

(a) When SBC Illinois retires copper loops or subloops must it provision an alternative service over any available facility?

(b) Should the ICA include terms and conditions related to the loop "caps" set forth in 47 C.F.R. § 51.319(a)(5)(iii)?

(c) Should the pricing appendix contain pricing for declassified subloops?

SBC ILLINOIS POSITION

The parties have several disputes regarding the proper contract language governing access to unbundled loops.

First, the parties disagree regarding network disclosure requirements in the event of certain loop retirements. (Section 3.3.1.5.) In the *TRO*, the FCC promulgated new rules that require certain disclosures before an ILEC retires copper loops that are replaced with FTTH loops. *TRO*, ¶¶ 281-83. While SBC Illinois' proposed language properly tracks these rules, XO proposes additional language that finds no support in the *TRO* or the FCC's rules. In particular, XO proposes that SBC Illinois be required to "provision an alternative service" before making any retirement. But the FCC's rules, by their plain terms, only require an ILEC to make certain disclosures before effecting such retirements. Similarly, section 251(c)(5) of the 1996 Act, upon which the FCC's network disclosure rules are based, only requires public notice of certain network changes. Neither the Act nor the FCC's rules require an ILEC to first make alternative service arrangements before retiring copper loops, as XO proposes.

Second, the parties disagree regarding implementation of the *TRO*'s DS3 loop cap, which provides that a CLEC may obtain a maximum of two DS3 loops at any single customer location. *TRO*, ¶ 324. While XO does not object to reflecting the *TRO*'s DS3 loop cap in the parties' contract, it does oppose some additional language proposed by SBC Illinois that more clearly spells out how that cap would be implemented if the FCC were to require the unbundling of DS3 loops at some point in the future. XO, however, has not explained its objection to this additional language, and SBC Illinois' language is reasonable and appropriate. As the FCC itself recognized, carriers may sometimes need to "negotiate specific terms and conditions necessary to translate our rules into the commercial environment." *TRO*, ¶ 700.

SBC Illinois notes that the FCC's rules requiring the unbundling of high-capacity loops have been vacated. Accordingly, SBC Illinois' language would come into play only if the FCC were to re-institute such an unbundling requirement. Nevertheless, it is reasonable to adopt SBC Illinois' language, because that language clearly defines how the DS3 loop cap would be calculated (by making clear that it applies to each end user customer premises location) and applied in a commercial environment if the FCC were to require DS3 loop unbundling at some point in the future.

Third, XO opposes SBC Illinois' proposal to delete from the parties' pricing schedule the prices for three fiber feeder subloops identified by SBC Illinois. In the *TRO*, the FCC held that ILECs are not required to unbundle fiber feeder subloops. *TRO*, ¶ 253. Thus, SBC Illinois is not required to unbundle the three fiber feeder subloops it identified, and those prices may appropriately be deleted.

ISSUE SBC-4: Advanced Services

(a) What terms and conditions should apply to hybrid loops?

(b) What terms and conditions should apply to Line Conditioning?

(c) What terms and conditions should apply to the HFPL?

SBC ILLINOIS POSITION

With respect to hybrid loops, SBC Illinois proposes to precisely track the detailed new rules promulgated by the FCC in the *TRO* regarding hybrid loops. XO's proposed language, on the other hand, states that SBC Illinois shall provide access to hybrid loops on an unbundled basis, and vaguely refers to "applicable law" and section 271. That language is unreasonable, because it fails to specify the parties' rights and obligations with respect to hybrid loops. The purpose of an interconnection agreement is to translate applicable law into the commercial environment, and spell out the parties' respective rights and obligations. SBC Illinois' proposed language does just that, closely following the FCC's hybrid loop rules. Moreover, the Commission should reject XO's attempt to invoke section 271 to require SBC Illinois to provide access to hybrid loops at section 251 rates, terms, and conditions, for the reasons explained above under Issue SBC-1.

With respect to line conditioning, the Commission should approve SBC Illinois' proposed contract language. That language properly implements the FCC's line conditioning rule (FCC Rule 319(a)(1)(iii)(A)), and XO has not explained its objection to SBC Illinois' proposed language.

With respect to access to the HFPL (line sharing), the Commission should adopt SBC Illinois' proposed language. In the *TRO*, the FCC conclusively held that ILECs are not required to unbundle the HFPL, and held that such a requirement would contravene Congress' goals in the 1996 Act. *TRO*, ¶¶ 258-63. Thus, the FCC established detailed rules to govern the phase-out of the HFPL. FCC Rule 319(a)(1)(i). Moreover, the D.C. Circuit upheld the FCC's findings and rules in *USTA II*. Therefore, the parties' contract should be amended to precisely track and implement these new FCC rules, as SBC Illinois' proposed contract language does.

XO's proposed language, on the other hand, falls far short of implementing the *TRO*'s new line sharing rules. For instance, XO would define "grandfathered" line sharing arrangements in a manner different than the definition contained in the FCC's actual rules; would require SBC Illinois to provide the HFPL under section 271, even though the HFPL is not a section 271 checklist item (and even if it were, the Commission lacks jurisdiction over section 271 checklist items, and in any event could not require the provision of a checklist item at section 251 UNE rates, terms, and conditions, as explained above); and suggests that SBC Illinois might be required to provide the HFPL under state law, even though the FCC (and NARUC and several other state commissions) made clear that any such requirement would be preempted.

Finally, the Commission should not address the additional language that XO inserted into the parties' joint issues matrix that does not relate the any of the issues raised by XO in its arbitration petition or by SBC Illinois in its response to that petition (*e.g.*, language relating to line splitting). Section 252(b)(4)(A) of the 1996 Act expressly limits the issues to be considered in this arbitration to "the issues set forth in the petition and in the response," and XO's attempt to introduce new issues is thus contrary to the Act.

ISSUE SBC-5: Dark Fiber

What terms and conditions should apply to SBC Illinois' provision of Dark Fiber Loop and Dark Fiber Transport?

SBC ILLINOIS POSITION

SBC Illinois' proposed language properly reflects the scope of SBC Illinois' obligation to provide unbundled dark fiber. In particular, SBC Illinois is required to provide unbundled dark fiber only where dark fiber is lawfully a UNE under section 251 of the Act. XO's proposed language, on the other hand, would unlawfully require SBC Illinois to provide unbundled dark fiber whether it was lawfully a UNE or not. (Section 3.5.3.1.) XO's proposed language must be rejected, and SBC Illinois' adopted, for the same reasons discussed above under Issue SBC-1.

The FCC's rules requiring the unbundling of high-capacity loops and dedicated transport (including dark fiber) have been vacated. Accordingly, SBC Illinois' language would come into play only if the FCC were to re-institute such unbundling requirements. Nevertheless, it is reasonable to adopt SBC Illinois' proposed language, because that language would most appropriately define SBC Illinois' obligations should the FCC require the unbundling of dark fiber in the future, while XO's language would not.

XO's proposed language regarding the declassification of dark fiber loops by this Commission must be rejected. (Section 3.1.6.) That language appears intended to implement an FCC Rule (the FCC's dark fiber loop rule, Rule 319(a)(6), which provides for state commission non-impairment determinations) that has been vacated.

XO opposes SBC Illinois' proposed contract language providing that, to the extent SBC Illinois is required by an FCC rule to unbundle dark fiber, unbundled dark fiber will be provided only where a CLEC is collocated. (Sections 3.1.6 and 3.5.3.1.) In the *TRO*, the FCC explained that a CLEC purchasing unbundled dark fiber must also collocate and provide optronics to light

the dark fiber. *TRO*, ¶¶ 313, 381-82. SBC Illinois' proposed language is consistent with the FCC's language, and thus should be included in the parties' *TRO* amendment.

Finally, the Commission should approve SBC Illinois' proposed description of dark fiber dedicated transport, and reject XO's. (Section 3.5.3.1.) In the *TRO*, the FCC redefined dedicated transport to *include* only transmission facilities between ILEC switches and to *exclude* transmission facilities outside the ILEC's network, such as transmission facilities connecting the ILEC's network to a CLEC's network. *TRO*, ¶ 366. XO proposes to include only the first half of this new definition in the parties' contract. But XO has not identified any basis for excluding the second half of the FCC's definition from the parties' contract, and there is none. Rather, the parties' contract should be revised to make clear that dedicated transport now excludes transmission facilities between SBC Illinois' and a CLEC's network, as SBC Illinois' proposed language does.

ISSUE SBC-6: Interoffice Facilities

(a) May XO obtain from SBC Illinois at TELRIC rates, Unbundled Interoffice Facilities (Dedicated Transport and/or Dark Fiber Transport) to connect the CLEC premises or Point of Presence (POP)?

(b) Is SBC obligated to provide TELRIC-based transmission facilities for interconnection and the exchange of traffic pursuant to Section 251(c)(2)?

(c) What terms and conditions should apply to the DS3 dedicated transport caps?

(d) Should the pricing schedule include pricing for entrance facilities, OC3, OC12 and OC48 dedicated transport, cross connects and multiplexing?

SBC ILLINOIS POSITION

SBC Illinois' proposed dedicated transport language appropriately limits the provision of dedicated transport to instances where dedicated transport is a lawful UNE. XO's proposed language, on the other hand, would require SBC Illinois to provide dedicated transport on an unbundled basis whether it is lawfully a UNE or not. XO's proposed language must be rejected, and SBC Illinois' adopted, for the same reasons discussed above under Issue SBC-1.

XO also proposes to continue to require SBC Illinois to provide entrance facilities at TELRIC rates. That proposal is unlawful. In the *TRO*, the FCC redefined dedicated transport to *exclude* facilities outside the ILEC's network, which the FCC held include entrance facilities. *TRO*, ¶ 366. Thus, the *TRO* "eliminates 'entrance facilities' as UNEs." *Id.* n. 1116. SBC Illinois' proposed definition of dedicated transport is necessary to implement this new law. While the FCC's rule requiring the unbundling of dedicated transport has been vacated, the D.C. Circuit did not vacate the FCC's determination that entrance facilities are no longer UNEs, and are no longer within the definition of "dedicated transport." Thus, SBC Illinois' proposed

language is appropriate, in the event that the FCC adopts new rules requiring the unbundling of dedicated transport.

The Commission should also reject XO's attempt to turn the section 251(c)(2) duty to interconnect into some kind of duty on the part of ILECs to transport traffic for a CLEC from the CLEC's network to the point of interconnection, at TELRIC-based rates. Section 251(c)(2), by its plain terms, requires an ILEC to interconnect with a CLEC at a point *within* the ILEC's network. It does not require an ILEC to provide a transmission facility from that point within the ILEC's network to the CLEC's premises (*e.g.*, an entrance facility). Indeed, in the *TRO* the FCC explicitly contrasted "transmission facilities connecting incumbent LEC networks to competitive LEC networks for the purpose of backhauling traffic" with "the facilities that incumbent LECs explicitly must make available for section 251(c)(2) interconnection." *TRO*, ¶ 365. In short, XO itself is responsible for delivering its traffic from its premises to the point of interconnection within SBC Illinois' network. Moreover, because entrance facility terms and conditions are outside section 251(b) and (c), and because SBC Illinois refused to negotiate the entrance facility issue, that issue is not subject to state commission arbitration. *Coserv LLC v. SWBT*, 350 F.3d 482 (5th Cir. 2003).

Finally, the Commission should approve SBC Illinois' proposed language regarding the cap on DS3 dedicated transport, required by FCC Rule 319(e)(2)(iii), and reject XO's proposed language. The FCC's rules requiring the unbundling of dedicated transport have been vacated, so the DS3 dedicated transport cap language would come into play only if the FCC were to re-institute such an unbundling requirement. Nevertheless, it is reasonable to adopt SBC Illinois' language, because that language clearly defines how the DS3 dedicated transport cap would be calculated and applied in a commercial environment if the FCC were to require DS3 dedicated transport unbundling at some point in the future. XO's language finds no support anywhere in the FCC's Rule or its discussion of the cap, and thus must be rejected.

ISSUE SBC-7: Unbundled Local Switching and Shared Transport

Should the ICA include the *TRO*'s modifications to the rules regarding the provision of unbundled local switching and shared transport?

SBC ILLINOIS POSITION

The *TRO* created a new regime to govern the provision of unbundled switching. Most fundamentally, pursuant to the D.C. Circuit's direction in *USTA I* to take specific markets into account, the FCC defined two classes of switching, (1) switching used to serve enterprise customers (enterprise switching) and (2) switching used to serve mass market customers (mass market switching). The FCC defined enterprise customers to include all customers served by DS1 or higher capacity facilities, as well as customers served at a single location by multiple DS0s higher than the "DS0 cutoff," and defined mass market customers as customers served by a number of DS0s below the DS0 cutoff. *TRO*, ¶¶ 451, 497. XO's proposed language, however, unlike SBC Illinois', fails to reflect even this basic definitional distinction created by the FCC.

XO's proposed language also fails to reflect the law regarding enterprise switching – in particular the FCC's holding that enterprise switching is not a UNE. The FCC held, and promulgated a rule stating, that an ILEC is required to provide unbundled access to enterprise switching only where the FCC grants a waiver of its finding of non-impairment. XO's proposed language, unlike SBC Illinois' language, fails to clearly reflect this holding, but instead refers to section 271 and other "applicable law." But the applicable law is clear: pursuant to the *TRO*, (and *USTA II*, which upheld the FCC's rules regarding enterprise switching and its conclusions regarding section 271), SBC Illinois is not required to provide unbundled access to enterprise switching, and is not required by section 271 to provide such access on section 251 UNE rates, terms, and conditions. This law must be reflected in the parties' *TRO* contract amendment, as SBC Illinois' proposed language does.

XO's proposed language also violates federal law regarding a waiver of the FCC's non-impairment finding with respect to enterprise switching. The FCC held that, while state commissions may investigate impairment with respect to enterprise switching and petition the FCC for a waiver of its non-impairment finding, an ILEC is not required to provide unbundled access to enterprise switching unless "the [FCC] grants such waiver." FCC Rule 319(d)(3). XO's proposal that the state commission investigation itself, and the FCC's consideration of any state commission petition, act as a waiver of the FCC's non-impairment finding is unlawful, and must be rejected. (XO's proposed language regarding the transition for enterprise switching arrangements where enterprise switching is no longer required to be unbundled should be rejected for the same reasons discussed above under Issue SBC-2.) SBC Illinois' proposed contract language, on the other hand, properly tracks and implements the FCC's waiver rule, and thus should be adopted.

XO's proposed mass market switching contract language should also be rejected, because that language is unsupported by the FCC's rules. XO's proposed language fails to recognize that the FCC's rules requiring the unbundling of mass market switching have been vacated. SBC Illinois' proposed mass market switching language appropriate accounts for this fact, and would come into play only if the FCC were to re-institute such an unbundling requirement. Thus, SBC Illinois' proposed mass market switching language should be adopted. Moreover, as explained above, the Commission should reject XO's unlawful suggestion that the Commission should require SBC Illinois to continue providing non-UNEs at the same rates, terms, and conditions as UNEs pursuant to section 271.

XO's proposed definition of tandem switching also violates federal law, by failing to recognize that SBC Illinois is required to provide unbundled tandem switching only where it is required to provide unbundled switching. SBC Illinois' proposed language, on the other hand, properly reflect this federal law.

Finally, the Commission should adopt SBC Illinois' proposed language regarding the provision of unbundled shared transport. That language properly implements FCC Rule 319(d)(4) by providing, like FCC Rule 319(d)(4), that SBC Illinois is required to provide unbundled shared transport only where it is required to provide unbundled switching.

ISSUE SBC-8: Call-Related Databases

What terms and conditions should apply to call-related databases LIDB and CNAM, provided in conjunction with UNE-P?

SBC ILLINOIS POSITION

Issue SBC-8 concerns the provision of call-related databases. The language to which XO objects is this: "Access to call-related databases LIDB [line information database] and CNAM [Caller Name with ID database], for SBC-Illinois will be provided as described in the following Appendices: LIDB and CNAM-AS, LIDB, and CNAM Queries." SBC Ill. Section 3.9.1. XO has not articulated any objection to this language, which merely specifies that SBC Illinois will provide access to LIDB and CNAM as provided for in the relevant appendices of the agreement, and SBC Illinois can discern none. SBC Illinois' language is reasonable and appropriate, and should be adopted.

Further, while XO did not originally designate this issue for arbitration, XO subsequently presented its own competing language for arbitration (in its response to SBC Illinois' response to the arbitration petition). XO's language should be rejected. XO proposes that SBC Illinois be required to continue providing call-related databases at sections 251 UNE rates, terms, and conditions as an obligation under section 271 of the Act. XO Sections 3.9.2.1, 3.9.2.2. As SBC Illinois explained previously, that proposal violates the FCC's holding that section 271 checklist items do *not* have to be provided on such terms, and, in any event, this Commission lacks jurisdiction to address the issue of section 271 rates, terms, and conditions.

ISSUE SBC-9: Signaling Networks

What terms and conditions should apply to SS7 provided in conjunction with UNE-P?

SBC ILLINOIS POSITION

Issue SBC-9 concerns implementation of the *TRO*'s new requirements with respect to unbundled access to signaling networks. While in the *UNE Remand Order* the FCC had concluded that CLECs are entitled to unbundled access to signaling networks, it modified that conclusion in the *TRO*. The FCC found that "competitive LECs are no longer impaired without access to such networks," except where the ILEC must "provide access to switching as a UNE," because "there are sufficient alternatives in the market." *TRO*, ¶ 544. Thus, except for where an ILEC must provide switching as a UNE, the FCC "reject[ed] the claims of competitive carriers that signaling networks should remain available as UNEs," and held that "we are no longer requiring incumbent LECs, pursuant to section 251(c)(3), to provide unbundled access to their switching networks." *Id.*, ¶¶ 546, 548. The FCC codified its new requirements in FCC Rule 319(d)(4)(i).

To implement this new FCC rule, SBC Illinois proposes language stating that it "will provide SS7 signaling on interswitch calls originating from a Lawful UNE ULS port," but that "[a]ll other use of SS7 signaling is pursuant to the applicable Access tariff." SBC Ill. Section 3.11.1. XO has not articulated its objection to this language, which is clearly necessary to

implement the new requirements of the *TRO*, and thus SBC Illinois' proposed language should be adopted. The FCC held that CLECs are entitled to access signaling networks as a UNE only where an ILEC is required to provide switching as a UNE, and this holding must be reflected in the parties' *TRO* contract amendment.

While XO did not originally identify this as an issue for arbitration, XO subsequently presented competing contract language to govern the provision of unbundled access to signaling networks. XO's language is unlawful, and must be rejected. In particular, XO proposes that SBC Illinois be required to continue providing signaling networks at sections 251 UNE rates, terms, and conditions as an obligation under section 271 of the Act. XO Section 3.11.2.1. As SBC Illinois explained previously, that proposal violates the FCC's holding that section 271 checklist items do *not* have to be provided on such terms, and, in any event, this Commission lacks jurisdiction to address the issue of section 271 rates, terms, and conditions.

ISSUE SBC-10: Advanced Intelligent Network (AIN)

What terms and conditions should apply to the Advanced Intelligent Network (AIN) provided in conjunction with UNE-P?

SBC ILLINOIS POSITION

Issue SBC-10 concerns implementation of the *TRO*'s new requirements with respect to unbundled access to the Advanced Intelligent Network ("AIN"). In the *TRO*, the FCC modified its rules regarding unbundled access to AIN. In the *UNE Remand Order*, the FCC had found that ILECs "were required to provide unbundled access to AIN platform and architecture," but not "AIN service software." *TRO*, ¶ 556. In the *TRO*, however, the FCC "conclude[d] that the market for AIN platform and architecture has matured since the [FCC] adopted the *UNE Remand Order* and we no longer find that competitive LECs are impaired without unbundled access to those databases." *Id.* Thus, the FCC "no longer require[s] incumbent LECs to unbundle access to the AIN databases for carriers not using the incumbent LEC's switching capabilities." *Id.* n.1724. The FCC codified this holding in FCC Rule 319(d)(4)(i).

To implement this new FCC rule, SBC Illinois proposes new contract language that states that the provisions of the agreement relating to the provision of AIN apply only when the CLEC is providing service using unbundled switching. SBC Ill. Section 3.12.1. XO has not articulated any objection to SBC Illinois' proposed language, which is clearly necessary to implement the new requirements of the *TRO*, and thus SBC Illinois' proposed language should be adopted.[1]

[1] XO proposes language under SBC Issue-9 to the effect that SBC Illinois is required to provide unbundled access to all call-related databases (including AIN) on section 251 rates, terms, and conditions pursuant to section 271. XO Section 3.9.2.1. As SBC Illinois has explained, that proposal is both unlawful and beyond this Commission's jurisdiction.

ISSUE SBC-11: Tariffs

(a) Does the *TRO* provide that a CLEC may pick and choose between its ICA and any SBC Illinois tariff?

(b) Should the ICA terms and conditions, including those of the *TRO* Amendment, prevail over SBC's tariffs?

SBC ILLINOIS POSITION

XO inappropriately proposes to give itself a unilateral right to pick and choose between provisions of the parties' interconnection agreement and any SBC Illinois tariffs, at its sole option. SBC Illinois does not have the right to unilaterally decide that it will ignore the parties' interconnection agreement and instead provide service pursuant to the terms of a tariff, and XO should not have such a right either. The 1996 Act provides that interconnection agreements are to be the "binding" statement of the parties' respective rights and obligations, and both parties should be held to the terms of their binding interconnection agreement. Moreover, the Seventh Circuit (and other courts) has held that state commissions may not "create an alternative method by which a competitor can obtain interconnection rights" through tariffs outside the section 252 process. *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 442-45 (7th Cir. 2003). *See also Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 496-98 (7th Cir. 2004). The Commission should reject XO's proposal to bypass the detailed, comprehensive interconnection agreement scheme created by Congress by establishing a right to unilaterally evade its interconnection agreement rights and obligations.

ISSUE SBC-12: Effect of TRO Contract Amendment

(a) Should the Cover Amendment clarify how the terms and conditions of the amendment replace the terms and conditions of the underlying agreement?

(b) Should the Cover Amendment reserve both parties' rights with respect to "remedies and arguments with respect to any orders, decisions, legislation or proceedings"?

SBC ILLINOIS POSITION

Subissue 12(a) concerns additional language proposed by SBC Illinois that provides examples of how particular conflicts between the parties' original contract and the *TRO* amendment should be resolved. XO claims that this language is "confusing." But this language is not confusing at all, and appropriately sets forth the proper resolution of conflicts between the original agreement and the *TRO* amendment. For instance, XO should not be able to nullify the parties' *TRO* amendment by asserting that conflicting provisions of the original contract still apply merely because they still physically appear in the parties' contract. Moreover, XO has raised no objection to the substance of SBC Illinois' proposed language, in that XO does not disagree with SBC Illinois' explanation of how various conflicts should be resolved. Thus, SBC Illinois' proposed language should be adopted.

Subissue 12(b) concerns certain reservation of rights language proposed by SBC Illinois. Non-waiver of rights clauses are common in interconnection agreements, and even XO has proposed such provisions for the parties' *TRO* amendment. XO has not explained its objection to SBC Illinois' proposed language, which equally protects both parties. SBC Illinois' language is reasonable, and should be adopted.

ISSUE SBC-13: What should happen if the TRO is stayed, reversed or vacated?

SBC ILLINOIS POSITION

SBC Illinois' proposed language appropriately specifies what should occur upon a remand (but not a reversal) of portions of the *TRO*. Specifically, in the case of such an event, it is appropriate to maintain the affected portions of the parties' agreement in effect, unless those portions are otherwise rendered invalid or modified by a change of law or UNE declassification event. XO's contrary proposal to simply freeze the contract without regard to changes in law or UNE declassifications is improper, and should be rejected.

XO's proposed language regarding a stay, or reversal and vacatur, of the *TRO* should be rejected. XO's proposal would appear to give XO unilateral authority to determine the legal effect of such an event upon the parties' contract, and unilateral authority to determine which parts of the contract it will comply with, and which it will not. That proposal is unreasonable.

ISSUE SBC-14: Performance Measures

Should SBC Illinois be required to report on and pay performance measures when a UNE is declassified?

SBC ILLINOIS POSITION

SBC Illinois' performance measures plan and remedies, previously approved by the Commission, is intended to ensure that SBC Illinois satisfies its obligations regarding the provision of UNEs to competitors. To the extent a network element is no longer a section 251 UNE, that plan and those remedies no longer apply. SBC Illinois' proposed language, which makes this consequence of UNE declassification expressly clear, is thus reasonable and appropriate, and should be adopted. Moreover, as explained above, the Commission should reject XO's unlawful suggestion that the Commission should require SBC Illinois to continue providing non-UNEs at the same rates, terms, and conditions as UNEs pursuant to section 271.